Supreme Court, U. S.
FILED
JUN 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL RODGERS
*General Counsel*

KENNETH E. HARDMAN
*Deputy Assistant General Counsel*

National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

*Counsel for Petitioner*

June 9, 1975

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

# TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 14 |
| I. The FCC's "Free Entry" Policy for Specialized Common Carriers Conflicts with this Court's Determination in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), that a Regulatory Agency May not Defer to the Market Place as the Measure of a Statutorily Mandated Decisional Standard | 15 |
| II. The Extent to which a Reviewing Court Should Consider Subsequent Inconsistent Agency Action is an Important Question of Administrative Law which is Likely to be Recurring, and which Requires Guidance by this Court | 19 |
| III. Sanction by the Court of Appeals of the FCC's Failure to Comply with NEPA so far Departs from an Acceptable Course of Judicial Review that this Court Should Exercise its Supervisory Powers | 23 |
| CONCLUSION | 26 |

# TABLE OF AUTHORITIES


Page

**Cases:**

*Allocation of Microwave Frequencies Above 890 Mc*, 27 F.C.C. 359 (1959), *affirmed and modified on reconsideration, Allocation of Frequencies in Bands Above 890 Mc*, 29 F.C.C. 825 (1960) ..... 7

*Burlington Truck Lines v. United States*, 371 U.S. 156 (1962) ..... 16, 20

*CAB v. Delta Air Lines*, 367 U.S. 316 (1961) ..... 16

*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) ..... 20

*CPI Microwave, Inc.*, 37 F.C.C. 2d 1120 (1972) (notation) ..... 19

*Data Transmission Company*, 34 F.C.C. 2d 306 (1972) .... 19

*FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1952) ..... 15

*FPC v. Texaco, Inc.*, 471 U.S. 380 (1974) ..... 14, 15, 16, 17, 19

*In the Matter of Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures,*

Notice of Inquiry, 46 F.C.C. 2d 214 (1974) ..... 12, 22

Memorandum Opinion and Order, 49 F.C.C. 2d 1238 (1974) ..... 21

First Supplemental Notice, 50 F.C.C. 2d 574 (1974) .. 12

*the Matter of Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules,*





Page

Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order, 24 F.C.C. 2d 318 (1970) ..... 10, 11

First Report and Order, 29 F.C.C. 2d 870 (1971) .... *passim*

Memorandum Opinion and Order, 31 F.C.C. 2d 1106 (1971) ..... 21

*In the Matter of Implementation of the National Environmental Policy Act of 1969,*

Notice of Proposed Rule Making, 36 F.C.C. 2d 108 (1972) ..... 25

Report and Order, 49 F.C.C. 2d 1313 (1974) ..... 12, 25

Order, 50 F.C.C. 2d 814 (1975) ..... 13

*MCI Carriers*, 27 F.C.C. 2d 380 (1971) ..... 19
32 F.C.C. 2d 36 (1971) ..... 19
35 F.C.C. 2d 98 (1972) ..... 19
37 F.C.C. 2d 1120 (1972) (notations) ..... 19

*Microwave Communications, Inc.*, 18 F.C.C. 2d 953 (1969), *reconsideration denied*, 21 F.C.C. 2d 190 (1970) ..... 7, 10, 21

*Nebraska Consolidated Communications Corporation*, 35 F.C.C. 2d 991 (1972) (notation) ..... 19

*New York v. United States*, 342 U.S. 882 (1951) (Douglas, J., dissenting) ..... 16

*NLRB v. Metropolitan L. Ins. Co.*, 380 U.S. 438 (1965) ..... 20

*SEC v. Chenery Corp.*, 332 U.S. 194 (1947) ..... 20

*Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930) ..... 6

*Southern Pacific Communications Company*, 37 F.C.C. 2d 245 (1972) ..... 19

| | Page |
|---|---|
| *United States Transmission Systems*, 48 F.C.C. 2d 859 (1974) | 19 |
| *Western Tele-Communications, Inc.*, 35 F.C.C. 2d 991 (1972) (notations) | 19 |

**Statutes:**

| | |
|---|---|
| Administrative Procedure Act, 5 U.S.C. § 706 (1970) | 20 |
| Communications Act, 47 U.S.C. § 151, *et seq.* (1970) | *passim* |
| 47 U.S.C. § 201, *et seq.* (1970) (Title II) | 5 |
| 47 U.S.C. § 214 (1970) | 12 |
| 47 U.S.C. § 221(c) (1970) | 6 |
| 47 U.S.C. § 301, *et seq.* (1970) (Title III) | 5 |
| 47 U.S.C. § 309 (1970) | 12 |
| 47 U.S.C. § 310 (1970, Supp. III) | 19 |
| 47 U.S.C. § 410(c) (1970, Supp. III) | 3 |
| National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (1970) | *passim* |
| 28 U.S.C. § 1254(1) (1970) | 2 |
| 49 U.S.C. § 302(b)(2) (1970) | 3 |
| 49 U.S.C. § 305(f) (1970) | 3 |
| 49 U.S.C. § 1673(a)(1) (1970) | 3 |

**Miscellaneous:**

| | |
|---|---|
| *Hearings before the Subcommittee on Communications of the Committee on Commerce, United States Senate, on Overview of the Federal Communications Commission*, 92d Cong., 2d Sess., Serial No. 92-54 (1972) | 7 |


**IN THE**

# Supreme Court of the United States

**OCTOBER TERM, 1974**

---

**No.**

---

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Petitioner, the National Association of Regulatory Utility Commissioners, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 20, 1975.

## OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been generally reported,[1] appears at Appendix A to this petition.[2] The First Report and Order of the Federal Com-

---

[1] However, excerpts of the opinion appear at 43 U.S.L.W. 2341 (February 18, 1975).

[2] The appendices are separately bound in a companion volume, hereinafter cited as "Pet. App."

munications Commission (FCC), which is reported at 29 F.C.C. 2d 870 (1971), appears at Appendix C, and its Memorandum Opinion and Order denying reconsideration, reported at 31 F.C.C. 2d 1106 (1971), appears at Appendix D.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 20, 1975. A timely petition for rehearing was denied on March 12, 1975, by an order which appears at Appendix B, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

## QUESTIONS PRESENTED

1. Whether the FCC exceeded its authority under the Communications Act by promulgating, on the basis of a rulemaking proceeding, a "free entry" policy for new applicants seeking to provide specialized common carrier services to the public.

2. Whether an FCC decision may be sustained as rational, when the FCC has subsequently instituted an investigation of basic issues which were raised in the subject decision but were rejected by the FCC as being without merit.

3. Whether a Court of Appeals may permit the FCC to ignore the National Environmental Policy Act (NEPA), on grounds of timeliness of raising the issue that arguably may have been initially justified, when the Court's decision on review is not issued until two years after oral argument on the appeal, and at that time the FCC still had made no move to comply with the law.[3]

[3] In the event certiorari is granted, petitioner may also present the related issue for a ruling, namely, whether the FCC's failure to comply with NEPA should have been excused by the Court of Appeals had there been no extended delay in rendering its decision.



## STATUTORY PROVISIONS INVOLVED

1. Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (1970).

2. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970).

3. Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970).

Relevant sections of the statutes are set out in Appendices E through G, respectively.

## STATEMENT OF THE CASE

In this case the NARUC challenges a major policy decision of the Federal Communications Commission establishing a general rule favoring the unlimited or "free" entry of new entities seeking to provide domestic private line communications common carrier services to the public.

**Background.** For many years, common carrier telecommunications services have been provided to the American people through chosen instruments regulated by Federal and State regulatory agencies. The Congress created the FCC in 1934 to regulate interstate carrier telecommunications services, and its counterparts at the State level — members of the NARUC[4] — were established by their respective legislatures to regulate intrastate carrier services.

[4] The NARUC is "the national organization of State commissions" charged with the economic and safety regulation of utilities and carriers, as referred to by Congress in 49 U.S.C. §§ 302(b)(2), 305(f) and 1673(a)(1) (1970) and 47 U.S.C. § 410(c) (1970, Supp. III). A substantial portion of the opinion of the Court of Appeals is devoted to establishing the proposition that NARUC and its members have standing to mount the instant challenge to the FCC's decision. (Pet. App. 2a-18a). This portion of the Court's opinion is clearly correct, and review is not sought of that issue herein.

Insofar as pertinent here, there are three basic types of interstate carrier telecommunications services: Message Toll Telephone Service (MTS), Wide Area Telephone Service (WATS) and Private Line Service (PLS).[5] MTS is ordinary long distance telephone service, wherein a subscriber may be connected on demand with any other telephone anywhere in the nation. The charges for such service are fixed on a per message basis and reflect both the distance and the length of time of the call. In turn, rates are determined by averaging costs, so that they are the same for equidistant pairs of points, regardless of the actual costs of providing the service along a given route.

WATS enables a subscriber to be connected on demand with any other telephone in a specified geographical area (such as a State or one or more area codes), for essentially a fixed charge per month. PLS (also known popularly as "tie-lines" and "leased" or "dedicated" lines) provides a subscriber with an open circuit between two or more specific telephones or switchboards for essentially a fixed charge per month.

As can be seen, WATS and PLS are designed to meet the needs of large telecommunications users, and may be viewed as "volume discount" alternatives to MTS. Stated another way, the ordinary consumer is confined, as a practical matter, to MTS to meet his telecommunications needs, because he does not generate the volume required to make WATS and PLS discounts meaningful.

[5] Each of these services is also offered on an intrastate basis, subject to NARUC members' jurisdiction, with essentially similar rate and service characteristics. In addition, however, NARUC members regulate local exchange telephone service, which has no counterpart at the interstate level.



By the same token, the intercity telephone industry plant used to provide MTS, WATS and PLS is substantially fungible.[6]

The dominant entity providing domestic intercity telecommunications services is, of course, American Telephone & Telegraph Company (AT&T). Through its Long Lines Department and the facilities of its operating telephone company subsidiaries (popularly referred to collectively as the "Bell System"), it may be fairly said that AT&T provides and operates the overwhelming majority of all MTS, WATS and PLS facilities available in America. Independent, non-Bell telephone companies provide such services within their respective service areas; however, in almost all cases the services are provided jointly with the Bell System, with Bell providing the intercity transmission facilities and acting as the primary manager.

In addition, Western Union Telegraph Company provides PLS for non-voice (*i.e.*, record or data) applications, as an incident to its public telegraph service. For purposes of the decision below, the FCC characterized Western Union's operations as "modest" compared with those of AT&T. (Pet. App. 119a).

After World War II, technological advances made it possible to employ microwave radio frequencies in long haul communications transmission. This development called into play the FCC's function as manager of the frequency spectrum under Title III of the Communications Act, 47 U.S.C. § 301 *et seq.* (1970), in addition to its traditional common carrier regulatory function under Title II of the Act, 47 U.S.C. § 201 *et seq.* (1970).

[6] The major difference among the three services in this regard is that PLS circuits essentially bypass the switching apparatus of the telephone company that is used to complete circuits on demand for individual calls in MTS and WATS.

This development, and to a lesser extent other comparable innovations, has enabled AT&T to achieve marked economies of scale in the cost of intercity communications transmission in recent years. By consolidating the demand for MTS, WATS and PLS, and by furnishing such services through jointly-used facilities, AT&T has been able to introduce higher capacity, lower unit cost facilities into service than otherwise would have been possible. In turn, the users of each class of service have benefited from the stable or declining interstate rates that have resulted from technological cost reductions offsetting operating cost increases.

The benefits of these technological cost reductions have also been shared with users of local exchange and intrastate telephone service, regulated by NARUC members, through periodic modification of the process known as jurisdictional separations.[7] Under Section 221(c) of the Communications Act, 47 U.S.C. § 221(c) (1970), the FCC has the authority to allocate (*i.e.*, "separate") telephone company investment in plant in service between interstate and intrastate jurisdictions for ratemaking purposes.

The technological cost savings achieved in recent years at the interstate level have made it feasible, from a practical standpoint, to increase from time to time the relative proportion of telephone plant that is allocated to interstate jurisdiction, thereby more equitably reflecting the role of local exchange telephone facilities in the origination and termination of interstate calls. In 1972, Mr. Dean Burch, then Chairman of the FCC, estimated that the separations changes made since 1952 cumulated approximately $1

[7] The process of jurisdictional separations has previously been considered by this Court. *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 75 L.Ed. 255, 51 S.Ct. 65 (1930).



billion annually in revenue requirements that had been transferred from intrastate to interstate jurisdictions.[8]

Stated another way, users of local exchange and intrastate telephone services regulated by NARUC members pay approximately $1 billion *less* each year for such services as a direct consequence of microwave and other cost-saving technological innovations achieved in long haul communications transmission systems in recent years.

Until 1969, the FCC had not passed upon the issue of authorizing additional domestic communications common carrier transmission systems in the United States.[9] In that year, by a 4-3 decision, the FCC approved the application of Microwave Communications, Inc. (MCI) to establish a limited common carrier private line service utilizing point-to-point microwave technology along the high-density Chicago-St. Louis route. *Microwave Communications, Inc.*, 18 F.C.C. 2d 953 (1969), *reconsideration denied*, 21 F.C.C. 2d 190 (1970). In granting the application, the FCC believed that MCI's services would meet the specialized interoffice and interplant communications needs of small businesses. *See, e.g.*, 18 F.C.C. 2d at 953.[10]

[8] *Hearings before the Subcommittee on Communications of the Committee on Commerce, United States Senate, on Overview of the Federal Communications Commission*, 92d Cong., 2d Sess., Serial No. 92-54, p. 80 (1972).

[9] However, the FCC earlier had allocated microwave bands to large private users for the purpose of building microwave communications systems on an individual or shared-use basis to satisfy internal communications needs. *Allocation of Microwave Frequencies Above 890 Mc*, 27 F.C.C. 359 (1959), *affirmed and modified on reconsideration, Allocation of Frequencies in Bands Above 890 Mc*, 29 F.C.C. 825 (1960).

[10] Hence, MCI and the subsequently authorized similar entities became known as *specialized* common carriers, a reference that will sometimes be used hereinafter.

This decision provoked a vigorous dissent by Chairman Rosel Hyde, a 23-year veteran of the FCC, who pointed out:

> The decision of the majority is diametrically opposed to sound economics and regulatory principles. It likewise is designed to cost the average American ratepayer money to the immediate benefit of a few with special interests.
>
> The decision would authorize the use of a microwave frequency in one of the most critical bands for the benefit of at most 204 private line customers, according to the applicant's own marketing consultants. The same frequency could ordinarily be used to derive thousands of circuits, predominantly used for the benefit of the ordinary long distance message toll user. There has been no showing here of ". . . reasonable expectation that competition may have some beneficial effect" *(FCC v. RCA Communications, Inc., . . .)*.

Why does the majority condone this obviously grossly inefficient use of the spectrum. Because, they say, of the low cost and "flexibility" of the facilities proposed by applicants. It should be noted that the so-called "flexibility" cited by the majority is here, as it was in the TELPAK case, a mere euphemism connoting lower rates. But how is it that applicant is able to propose lower rates than the existing common carriers for private line service? For no other reason than that it is proposing a typical "cream skimming" operation. Thus, it has selected a major route, Chicago to St. Louis, with heavy traffic density characteristics and the concomitant lower unit costs. The existing common carriers, on the other hand have been encouraged by the Commission, primarily for social reasons, to base their rates both for message toll



and private line services on nationwide average costs. Thus the small user in the hinterlands is afforded the same rates as the large users in the major cities. The evidence in this record tends to show, and there is no basis in our experience to believe otherwise that AT&T and Western Union could offer lower rates for private line service between Chicago and St. Louis than those proposed by MCI, were they to base such rates on their costs for that route alone.

The chances are, and the record so indicates, that AT&T and Western Union will be constrained to lower their private line rates to meet the competition of MCI. This, however, means that other users, either the small private line users who are not so fortunate as to live in large cities, or message toll users, or both, will have to make up the difference if total revenue requirements are to be met. This is in addition to the higher costs which are bound to fall on all communications users by virtue of the inefficient use of the frequency at stake.

The effect of the majority decision is to destroy the principles of nationwide average rate making . . . . This entire case is a classic example of an inefficient, uneconomic misallocation of resources.

. . . In short, what we have is a grant of valuable spectrum space, with no adequate factual basis to warrant such an authorization. I am compelled to say, based upon this record, that the majority has acted not upon considered judgment of the evidence but rather, as in the RCA case, simply upon a reflex judgment that competition, particularly to AT&T, is *per se* good. The action,

because it is unsupported by the facts of record, is inconsistent with the statutory standard. 18 F.C.C. 2d at 971-973.[11]

**Proceedings Before the FCC Below.** Encouraged by MCI's success, numerous parties filed applications with the FCC seeking similar common carrier authorizations. As of July 17, 1970, there were 1,713 pending applications for microwave stations (Pet. App. 50a).[12] Accordingly, the FCC issued a *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order*, 24 F.C.C. 2d 318 (1970), to resolve certain basic policy and procedural questions, which the FCC believed to be common to all of the applications, prior to consideration of the individual applications.

Insofar as pertinent here, the Notice posed the following issues for consideration in the proceeding:

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field, and if so,
>
> B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances. (Pet. App. 62a-63a).

The discussion of Issue A in the Notice was posed as a "staff analysis" on which the FCC took no position pending consideration of comments by interested persons. (Pet.

[11] To the same effect were dissents by Commissioners Robert E. Lee and James J. Wadsworth. *See*, 18 F.C.C. 2d at 974.

[12] A number of applications were submitted by affiliated interests. Thus, for example, the FCC pointed out that as of March 15, 1971, there were 33 applicants, of which 17 were MCI affiliated, making 46 separate proposals and seeking a total of 1,877 microwave stations. (Pet. App. 50a).



App. 63a). The staff analysis concluded that a general policy in favor of new entry would serve the public interest because in the staff's view, competition appeared to be "reasonably feasible" and could be expected to have some beneficial effects "without adverse impact on service by established carriers." *(Id.)* Issue B was a Commission proposal, contingent upon the adoption of the staff position on Issue A and subject to modification in light of the FCC's resolution of that issue. *(Id.)* The FCC proposed *not* to hold comparative hearings unless a "much stronger" showing was made and it was persuaded that the public interest required such action in the particular situation. *(Id.)*

Approximately 200 parties participated in the proceeding (Pet. App. 64a), although as a generalization the most substantive submissions were those of the much more limited number of parties directly affected, *i.e.*, for the most part the applicants and the established carriers. Oral argument before the FCC *en banc* was heard on January 21-22, 1971, and rebuttal comments to oral argument were received. (Pet. App. 64a).

In its decision (Pet. App. 48a-188a), the FCC not suprisingly concluded that its staff analysis was correct, and that a "free entry" policy should be promulgated for the specialized common carriers. Consistent with this view, the FCC also declined to hold comparative hearings on the pending applications.

Petitions for reconsideration filed by the NARUC and the Washington Utilities and Transportation Commission (WUTC) were summarily rejected by the FCC. (Pet. App. 189a-194a).

**Proceedings Subsequent to FCC Decision.** Review of the decision was sought by the WUTC and the NARUC in the United States Court of Appeals for the Ninth Circuit. Initial and reply briefs were filed under dates of May 5,

1972, and September 22, 1972, respectively, and oral argument was held on February 15, 1973. The NARUC argued that the "free entry" policy promulgated by the FCC is inconsistent with the "public interest, convenience and necessity" standard of the Communications Act, 47 U.S.C. §§ 214, 309 (1970). In particular, the NARUC strenuously charged that the FCC had failed to adequately consider or investigate the impact of its decision on the rates paid by users for intrastate telephone service. (*See*, Pet. App. 27a). The NARUC also assigned as error the FCC's complete failure to consider the environmental impact of the policy adopted by the order, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1970).[13] (Pet. App. 39a).

More than a year after oral argument was held before the Court, but well prior to entry of its decision, the FCC launched a broad-ranging investigation, *inter alia*, of the impact of its specialized common carrier policy decision on local telephone service rates.[14] Heading the list of specific issues to be considered in the investigation is whether ". . . under present ground rules, competition from specialized common carriers (SCC's) has resulted or will result in the imposition upon the public of . . . [h]igher rates for residential telephone service."[15]

[13] The NARUC had not previously raised this issue before the FCC itself.

[14] *In the Matter of Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, Docket No. 20003, Notice of Inquiry, 46 F.C.C. 2d 214 (1974). The Court was first advised of this development by the NARUC by Consolidated Answer to Motion and Cross-Motion for Leave to File Copies of Commission Decision filed under date of May 8, 1974.

[15] *Id.*, First Supplemental Notice, 50 F.C.C. 2d 574, 576 (1974).



Moreover, shortly prior to issuance of the Court's decision, the FCC promulgated rules to implement NEPA in proceedings before it.[16] In pertinent part, the FCC declared that NEPA applies to rulemaking proceedings [17] (which it previously had denied in this case to the Court), and that the construction of common carrier microwave relay antenna towers or supporting structures exceeding 100 feet in height ". . . are considered to be major on the basis of their probable environmental significance. . . ."[18]

Nevertheless, the Court of Appeals affirmed the FCC's decision. (Pet. App. 18a-42a). The Court held that the case law permits the FCC wide discretion in its proceedings, and that the FCC's decision was an exercise of such discretion. (*See, generally*, Pet. App. 25a-39a). The Court also held that the FCC's discussion in its decision pertaining to economic impact on local telephone users "is adequate" (Pet. App. 27a), but the Court neither acknowledged nor discussed the FCC's economic impact investigation pending in Docket No. 20003. Finally, the Court recognized that the FCC could not discharge its responsibilities under NEPA by strictly relying upon private parties to raise environmental claims (Pet. App. 39a-40a), but the Court

[16] *In the Matter of Implementation of the National Environmental Policy Act of 1969*, Docket No. 19555, Report and Order, 49 F.C.C. 2d 1313 (1974). It should be pointed out that it took the FCC *five full years* after NEPA became effective to issue these rules.

[17] *Id.*, 49 F.C.C. at 1368 (Rule 1.1303). This requirement is codified at 47 C.F.R. § 1.1303. 39 Fed. Reg. 43835, 43844 (December 19, 1974).

[18] *Id.*, 49 F.C.C. at 1317, referencing Rule 1.1305. In turn, Rule 1.1305(a)(2), codified at 47 C.F.R. § 1.1305(a)(2), 39 Fed. Reg. 43835, 43844 (December 19, 1974), specifically identifies the construction of microwave towers as major actions within the meaning of NEPA. The FCC is giving further consideration to the difference in height considered to be major for microwave towers vis-a-vis other types of towers. Order, *In the Matter of Implementation of the National Environmental Policy Act of 1969*, 50 F.C.C. 2d 814 (1975).

nevertheless concluded that ". . . the balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court." (Pet. App. 40a-41a).

In its Petition for Rehearing to the Court (Pet. App. 216a-229a), the NARUC laid particular emphasis on the extent to which the pending economic impact investigation and the FCC's environmental rules vitiated the Court's stated legal basis for affirming the FCC's decision.

However, the NARUC's petition was summarily denied. (Pet. App. 47a).

## REASONS FOR GRANTING THE WRIT

By itself, the FCC's decision to fundamentally alter the structure by which communications services are delivered to the American people raises important issues of public policy which warrant plenary review by this Court. The policy adopted, and the aftermath of its implementation, in terms of changing communications rate structures, industry profile and its practices, unquestionably will affect every American who utilizes telephone service.

Specifically, however, the FCC's decision to promulgate a "free entry" policy for specialized common carriers conflicts with this Court's recent determination in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), that an administrative agency charged with regulating public utilities may not defer to the market place as the measure of its statutorily mandated decisional standard. Moreover, the failure of the Court of Appeals to acknowledge or discuss the FCC's subsequently initiated economic impact investigation squarely raises the issue of whether, in testing the adequacy of an agency decision, a reviewing court must blind itself to subsequent agency action that is fundamentally inconsistent with its posture before the court in the decision under



review. This issue is an important question of administrative law which is likely to recur, and which requires guidance by this Court.

Finally, sanction by the Court of Appeals of the FCC's complete failure — over more than a two-year period — to comply with the requirements of NEPA so far departs from an acceptable course of judicial review that this Court's exercise of its supervisory powers is warranted.

### I. THE FCC'S "FREE ENTRY" POLICY FOR SPECIALIZED COMMON CARRIERS CONFLICTS WITH THIS COURT'S DETERMINATION IN *FPC V. TEXACO, INC.*, 417 U.S. 380 (1974), THAT A REGULATORY AGENCY MAY NOT DEFER TO THE MARKET PLACE AS THE MEASURE OF A STATUTORILY MANDATED DECISIONAL STANDARD.

Fundamentally at issue in this case is whether a regulatory statute enacted by Congress, *i.e.*, the Communications Act, imposes any practicable limits on the discretion to be exercised by the FCC in licensing domestic communications common carrier systems to provide services to the public in competition with the services of existing carriers, principally American Telephone & Telegraph Company (AT&T).

In *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 97 L.Ed. 1470, 73 S.Ct. 998 (1952), upon which the Court of Appeals principally relied, this Court recognized that competition is a relevant factor in making statutory public interest determinations under the Communications Act, although the specific holding in that case is that a presumed national policy in favor of competition is insufficient in law to sustain grant of additional common carrier authorizations. 346 U.S. at 95, 97 L.Ed. at 1478.

Other cases have also affirmed the proposition that an administrative agency has discretion in making statutorily-mandated determinations.

However, there are clearly also countervailing propositions which have been recognized by this Court. As Mr. Justice Douglas cogently observed:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."[19]

Similarly, Chief Justice Warren has pointed out that an administrative agency ". . . is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do."[20]

Recently, in *FPC v. Texaco, Inc.*, 417 U.S. 380, 41 L.Ed. 2d 141, 94 S.Ct. 2315 (1974), this Court set aside an FPC order exempting small producers of natural gas from direct rate regulation. Although the specific ruling was that the order was too ambiguous to be sustained, the Court went on to say:

> For the purposes of the proceedings that may occur on remand, we should also stress that *in our view the prevailing price in the market place cannot be the final measure of "just and reasonable"*

[19] *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, 9 L.Ed. 2d 207, 215, 83 S.Ct. 239 (1962), quoting *New York v. United States*, 342 U.S. 882, 884, 96 L.Ed. 662, 663, 72 S.Ct. 152 (1951) (Dissenting opinion). Emphasis in original.

[20] *CAB v. Delta Air Lines*, 367 U.S. 316, 322, 6 L.Ed. 2d 869, 874, 81 S.Ct. 1611 (1961).



> *rates mandated by the Act.* It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and the monopolistic forces were distorting the market price for natural gas. Hence, the necessity for regulation . . . .[21]

The Court further stated:

> In concluding that the Commission lacks the authority to place exclusive reliance on market prices, we bow to our perception of legislative intent. It may be, some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. *It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the legislature where the public interest may be considered from the multi-faceted points of view of the representational process.*[22]

As did the FPC in *Texaco*, the FCC held a rulemaking to implement its policy. As did the FPC in *Texaco*, the FCC here produced an elaborate rationale to support its policy decision. But the bottom line in both cases is that the FCC and FPC determined that the "congressional assumptions

[21] 417 U.S. at 397-398, 41 L.Ed. 2d at 156. Emphasis added. Footnote omitted.

[22] 417 U.S. at 400, 41 L.Ed. 2d at 157-158. Emphasis added. Footnote omitted.

embedded into the framework of regulation established by the Act" were no longer appropriate, if they ever were.

Accordingly, the FCC, as did the FPC, determined that the market place should be the measure of additional entry into communications common carriage, rather than the regulated entry mandated by Congress.

The latter proposition can be demonstrated briefly. After making generalized findings relating to need for new entry on a nationwide basis, and collateral matters, the FCC concluded:

> . . . [I]f an applicant is found qualified, obtains the necessary financial backing, and makes a business judgment to risk that investment in competition with such of the pending applicants as may be authorized, we are not inclined to place further obstacles in its path. Moreover, since new entry by more than one private line applicant appears reasonably feasible in a potential market of this nature, *we deem the marketplace to be a more reliable and effective instrument than the comparative hearing process for determining how many and which new entrants may succeed.* (Pet. App. 159a-160a. Emphasis added).

These, then, are the standards by which the FCC authorized and will continue to authorize new specialized common carriers under the "public interest" standard of the Act: (1) whether the applicant is "qualified,"[23] (2) whether the applicant makes the "business judgment" to

[23] The NARUC is aware of no FCC requirements for entities to be "qualified," other than that they must make a minimal showing of capability to provide the proposed service (which must be done in any event by an unregulated businessman in order to get financial backing), and that they not contravene the provisions of the Act relating to alien

(continued)



enter the business, and (3) whether the applicant can get financial backing. Clearly, such standards in practice are nothing more than required of any businessman entering a completely unregulated activity. As such, they constitute deferral to the market place in conflict with this Court's ruling in *FPC v. Texaco, Inc., supra.*

## II. THE EXTENT TO WHICH A REVIEWING COURT SHOULD CONSIDER SUBSEQUENT INCONSISTENT AGENCY ACTION IS AN IMPORTANT QUESTION OF ADMINISTRATIVE LAW WHICH IS LIKELY TO BE RECURRING, AND WHICH REQUIRES GUIDANCE BY THIS COURT.

A second reason for granting the writ here requested is that this case calls into question the scope of factors which a reviewing court should properly consider in assessing the rationality, and therefore the lawfulness, of an agency decision. More specifically, this case raises the issue of whether a reviewing court must blind itself to subsequent agency action that is fundamentally inconsistent with its posture before the court in the decision under review. In discharging their function as the primary reviewers of agency action, Courts of Appeals are likely to face this question

(continued)

control and similar matters. 47 U.S.C. § 310 (1970, Supp. III). Although the Court of Appeals laid some stress on the fact that this decision did not act on the merits of individual applications (Pet. App. 29a), in practice the applications have been granted subsequent to this decision as essentially a ministerial function. *See, e.g., MCI Carriers,* 27 F.C.C. 2d 380 (1971); 32 F.C.C. 2d 36 (1971); 35 F.C.C. 2d 98 (1972); 37 F.C.C. 2d 1120 (1972) (four notations); *Nebraska Consolidated Communications Corporation,* 35 F.C.C. 2d 991 (1972) (notation); *Southern Pacific Communications Company,* 37 F.C.C. 2d 245 (1972); *Western Tele-Communications, Inc.,* 35 F.C.C. 2d 991 (1972) (notation); *CPI Microwave, Inc.,* 37 F.C.C. 2d 1120 (1972) (notation); *Data Transmission Company,* 34 F.C.C. 2d 306 (1972); *United States Transmission Systems,* 48 F.C.C. 2d 859 (1974).

on a recurring basis, and should have the benefit of this Court's guidance in their deliberations.

From time to time this Court has expanded upon the criteria by which the adequacy of an administrative decision is to be judged under the Administrative Procedure Act, 5 U.S.C. § 706 (1970). See, *e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L.Ed. 1995, 1999, 67 S.Ct. 1575 (1947) (court must judge the propriety of the agency's action solely on the grounds invoked by the agency; and if those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more proper basis); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 9 L.Ed. 2d 207, 216, 83 S.Ct. 239 (1962) (courts may not accept appellate counsel's post hoc rationalizations for agency action); *NLRB v. Metropolitan L. Ins. Co.*, 380 U.S. 438, 443, 13 L.Ed. 2d 951, 955, 85 S.Ct. 1061 (1965) (when agency exercises discretion it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 28 L.Ed. 2d 136, 153, 91 S.Ct. 814 (1971) (court must consider whether the agency decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment).

Administrative agencies necessarily write their opinions (particularly major ones such as here presented) with at least one eye cocked to the Courts of Appeals. Accordingly, the process of ferreting out discrepancies between what is *stated* in an opinion, and what the underlying *realities* are continually becomes more subtle. Under these circumstances, it is appropriate that the criteria employed by the Courts of Appeals to test agency decisions should likewise continually be refined.

This case presents such a refinement. One of the principal assignments of error urged by the NARUC upon the



Court of Appeals is that the FCC failed to adequately investigate or consider the impact of its decision on the telephone service rates paid by the vast majority of the telephone using public who have no use for the services of the specialized common carriers. (Pet. App. 27a).[24] Although the Court recognized, as NARUC contended, that the FCC has a legal duty to consider such economic impact (Pet. App. 13a), the Court summarily rejected the NARUC's claim that the duty had been insufficiently met by holding that the FCC's treatment of this issue "is adequate." (Pet. App. 27a).

In turn, the bottom line of the portions of the record cited by the Court is the FCC's categorical assertion that ". . . there is no valid basis for NARUC's assumption that such [specialized common carrier] entry will prejudice the users of local telephone services." (31 F.C.C. 2d at 1107-1108, Pet. App. 192a).

---

[24] In brief, the impact is two-fold; First, obtaining additional separations modifications becomes infeasible, as a practical matter, because of pressures on AT&T's interstate profits resulting from the PLS competition. (As an example, the NARUC filed a petition with the FCC for additional modifications on December 19, *1973*. On December 17, *1974*, the FCC announced that action on the petition would be indefinitely deferred. Memorandum Opinion and Order, *In the Matter of the Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, 49 F.C.C. 2d 1238, 1241. As noted above (pp. 6 - 7), the changes since 1952 alone reduce the telephone bills of intrastate ratepayers approximately **$1** *billion* annually. Thus, the benefits of long haul cost-saving technological innovations would no longer continue to be shared with the local telephone users.

Second, competitive revenue diversion from AT&T, coupled with rate reductions in PLS, brought about by competitive pressures, likely would require rate increases by AT&T in areas and services where no competition exists. See the dissenting opinion of Chairman Rosel Hyde in *Microwave Communications, Inc.*, 18 F.C.C. 2d 953, 971-973, quoted above, pp. 8 - 10. Thus, there can be an economic impact on AT&T's *customers* without necessarily an economic impact on *AT&T*.

However, in making its ruling the Court neither acknowledged nor discussed the fact that on April 10, 1974, *nine months before the Court's ruling*, the FCC had instituted an investigation in its Docket No. 20003 of the very contentions which it previously categorically rejected, and upon which the Court relied in affirming the FCC.[25]

Moreover, the Court summarily denied the NARUC's Petition for Rehearing (Pet. App. 47a), which strongly emphasized the fundamental inconsistency between the FCC's posture before the Court on review of this case, and its having instituted an expensive and burdensome investigation of issues it categorically rejected as having "no valid basis."[26]

The NARUC recognizes that there must be some practical end to litigation and the issues that may be raised on review of an agency decision. But where, as here, the agency acts so diametrically at odds with its posture before the court while the decision is still under review, the reviewing court should be flexible enough to account for that development and act accordingly.

---

[25] Notice of Inquiry, *In the Matter of the Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, 46 F.C.C. 2d 214 (1974). The Court was advised by the NARUC of the pendency of the proceeding and its significance as early as May, 1974. See above, p. 12, n. 14.

[26] For a fully documented showing of the FCC's inconsistency, see Part III of the NARUC's Petition for Rehearing. (Pet. App. 220a-224a). The NARUC would especially point out, however, that in instituting the economic impact investigation, the FCC specifically referred to the NARUC's claims of economic impact in this case. Notice of Inquiry, *In the Matter of the Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures*, 46 F.C.C. 2d 214, 215, quoted at Pet. App. 221a.



## III. SANCTION BY THE COURT OF APPEALS OF THE FCC'S FAILURE TO COMPLY WITH NEPA SO FAR DEPARTS FROM AN ACCEPTABLE COURSE OF JUDICIAL REVIEW THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS.

Finally, sanction by the Court of Appeals of the FCC's complete failure in this case — over more than a two-year period — to attempt any compliance whatsoever with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.* (1970), so far departs from an acceptable course of judicial review that this Court's exercise of its supervisory powers is warranted.

The proceedings before the FCC were tried on the basis of traditional issues of economic regulation, and it was not until review had been sought in the Court of Appeals that the NARUC understood NEPA's relevance in this case and raised that issue to the Court.[27] In its decision, the Court properly recognized that consideration of the NEPA claims would be within its discretion, even though not presented to the FCC in the first instance, and that NEPA's "lofty purposes" must be weighed heavily in the balance in exercising that discretion. (Pet. App. 40a). Nevertheless, the Court declined review. (Pet. App. 40a-42a).

---

[27] Specifically, the NARUC alleged adverse environmental impact resulting from the FCC's decision in the following respects: (1) the marring of the aesthetic environment because of the proliferation of multiple low-capacity transmission systems across the country, with microwave towers constructed every 20-40 miles, rather than a limited number of high capacity systems; and (2) the establishment of an overabundance of less expensive (relative to rural areas) communications facilities in highly populated urban corridors, tending to further concentrate businesses and population in these areas. The NARUC also raised as a matter of concern the possible increase in electromagnetic pollution that could result from a proliferation of systems, compared to a limited number of high capacity systems.

It may be, had the Court's decision issued without extended delay, that the discretion so exercised might have been sustainable.[28] In this case, however, oral argument on the appeal was not held until six months after the last round of briefs were filed, and the decision did not issue until *two years* thereafter. During the two and one-half years that the FCC was on notice that it had failed to comply with NEPA in this case, it made absolutely no move to rectify that failure. Even assuming the FCC's original omission was inadvertent, its continuing failure to comply with the law cannot be excused.

In its ruling below, the Court noted and relied upon the fact that:

> Before any construction [of microwave towers by specialized common carriers] is authorized, separate hearings must be held on each application. NEPA will be applicable to those proceedings. The FCC must consider "the environmental impact of the proposed action" as a whole, and in full context. It cannot treat each application separately from the others and ignore the total program of which it is a part. (Pet. App. 41a. Footnote omitted).

However, in its Petition for Rehearing, the NARUC advised the Court: (1) that the FCC *had not* held hearings on the individual applications, (2) that the FCC *had already granted* substantially all of the pending applications for specialized common carrier construction permits, and (3) that in granting these applications, the FCC gave *no consideration whatever* to environmental impact, let alone the comprehensive analysis that the Court recognized is legally required. (Pet. App. 225a). Accordingly, the NARUC advised the Court that if it did not review the NEPA issues,

[28] The NARUC specifically reserves this issue in the event certiorari is granted.



the FCC would be permitted to "entirely escape compliance with NEPA in one of the few general proceedings it has conducted which is likely to have a significant impact on the quality of the human environment." (Pet. App. 218a).

Inexplicably, the Court of Appeals refused to take any further action to uphold NEPA's "lofty purposes."

In light of the FCC's new rules for implementing NEPA,[29] there can be little doubt that the environmental impact should have been considered by the FCC. By the express terms of those rules, environmental issues are to be considered, and an environmental impact statement issued, in rulemaking proceedings;[30] and the construction of microwave towers such as here authorized are specifically designated as "major" Federal actions within the meaning of NEPA.[31] (Pet. App. 226a-227a).

The effect of the Court's action, therefore, is to permit a flagrant non-compliance with the law to go unredressed — a result which clearly warrants exercise by this Court of its supervisory powers.

[29] Report and Order, *In the Matter of Implementation of the National Environmental Policy Act of 1969*, 49 F.C.C. 2d 1313 (1974). The rules became effective with January 20, 1975 — *five full years* after NEPA became effective. The proposed rules were released on August 1, 1972, 36 F.C.C. 2d 108, but the final rules were not released until December 16, 1974. Coincidentally or otherwise, the final rules were not promulgated until substantially all of the pending applications for specialized common carrier construction permits had been granted.

[30] *Id.*, Rule 1.1303.

[31] *Id.*, Rule 1.1305(a)(2).

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

PAUL RODGERS
*General Counsel*

KENNETH E. HARDMAN
*Deputy Assistant General Counsel*

National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

*Counsel for Petitioner*

June 9, 1975